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Canadian Environmental Law Association
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Presentation by CELA to the Environmental Assessment Advisory Committee
May 18, 1994

Recommendations re Gravel Pit Zoning

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PRESENTATION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE ENVIRONMENTAL ASSESSMENT ADVISORY COMMITTEE

-- MAY 18, 1994 --

SUMMARY

* Current legislation and policy regarding aggregate extraction are not adequate to assess the environmental and social impacts of the Mardon Quarry

* Current legislation, policy and enforcement practices in general do not recognise, and force thousands of people to "live with", the nuisance and environmentally destructive effects of aggregate extraction

* Current legislation and policy is driven by the primary assumption that aggregate, wherever it is, will inevitably be extracted

* The primary assumption of current legislation and policy is that there is a need for aggregate extraction. This virtual legislation of need automatically tips the balance in favour of extraction, and prevents equal consideration of other important values associated with the land where aggregate exists

* The primary assumption of current legislation and policy supports environmentally destructive, wasteful and unsustainable transportation policies

RECOMMENDATIONS TO THE ENVIRONMENTAL ASSESSMENT ADVISORY COMMITTEE

1. Given the deficiencies of the current legislative regime, CELA recommends that EAAC advise the Minister that an Environmental Assessment is necessary in order to gauge the environmental impacts of the Mardon Quarry.

2. In light of the recent announcement of proposed amendments to planning law and policy in Ontario, CELA also requests that EAAC's report to the Minister be made public as soon as possible.

3. EAAC should advise the Minister to order a public review of Aggregate Resources Act policies, provisions and practices to examine, among other things

    a) public notice requirements
    b) planning and management of rehabilitation
    c) enforcement policies
    d) the virtual legislation of "need" in MARPS
    e) incentives to recycle and find alternatives to aggregate

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-- MAY 18, 1994 --

RE: THE MARDON QUARRY DESIGNATION REQUESTS

[Post Meeting Comment: The text that follows this comment is more-or-less the same as that delivered before the Committee on the afternoon of May 18, 1994. In light of some of the comments that were made after this presentation was given, however, we would like to offer the following clarifications.

We make mention in our presentation of the "virtual legislation" of the Provincial Mineral Aggregate Resources Policy Statement (MARPS) which states that there is a public need for aggregate. Provincial policy assumes that it is in the larger public interest to ensure a supply of cheap and readily available aggregate. We argue that this policy is not in the public interest because it imposes a regime of incompatible land uses, wholesale destruction of irreplaceable landforms, and supports unsustainable and destructive transportation policies. We submit that it is more in the public interest to give the aggregate industry the incentive to use more sustainably the aggregate they have access to now, to give the aggregate industry the incentive to recycle and to find alternatives to aggregate. It is our submission that one way to create this incentive is to restrict and/or prohibit access to aggregate in environmentally-sensitive areas.

Current policies, as applied, do not allow for the outright prohibition of aggregate extraction, and assume, in permitting extraction, that populations in the area will bear the nuisance effects of the extraction. This is what leads us to the statement that the current legislative regime does not adequately deal with the environmental and social costs of aggregate extraction. So we are not, as was suggested, wrong about how the Aggregate Resources Act provides for environmental protection. The Act requires controlled destruction of aggregate-bearing lands, and requires consideration of mitigating the nuisance effects of extraction. The regime, therefore, shows concern for whatever environment is left after extraction and requires there be some limit to nuisance effects. But, first and foremost, MARPS and the Act, mandate and permit environmental destruction at significant social cost.]

It appears to us that there are two basic questions that need to be answered. The first, which is the general topic of this meeting, is whether or not current legislation and policy are adequate to assess and mitigate the environmental impacts of the proposed Mardon Quarry.

The second basic question is whether or not current legislation and policy are adequate at all to deal with the increasingly contentious issues surrounding aggregate extraction in this Province.

It is our submission that the answer to both questions is the same, and that answer is no. Current legislation and policies are not adequate. They neither adequately address nor account for the environmental and social impacts of aggregate extraction.
They fail in these areas because the fundamental premise informing current legislation and policy is that aggregate, sooner or later, must and will be extracted. Other considerations, environmental and social, pale in the face of this overriding assumption.

My discussion is broken down into three parts. I will discuss first the world of aggregate extraction as CELA experiences it in its role as a legal aid clinic which specializes in environmental law.

The second part of my discussion will deal with the specific example of how current legislation and policy has been applied in the recent OMB decision regarding four separate aggregate pit permit applications in the Township of Oro.

The third section will be a brief discussion of the big picture. I will examine one of the reasons why aggregate extraction appears to be so imperative in this province: and that is current transportation policy.

PART ONE: The Small Picture -- People and Gravel Pits

As mentioned, CELA is a legal aid clinic specializing in environmental law. We are the only such clinic in the province. It is our mandate to provide legal representation to low income individuals and citizens groups with environmental law problems, to provide summary advice to just about anyone who calls, and to work for environmental legal reform.

It is one of my duties at CELA to take calls from people from all over the province who have questions about environmental law. I get a lot of calls about pits and quarries. While this experience may not amount to anything like a scientific survey, I have heard enough information to make the following general observations:

No one likes to live near a gravel pit. Even when the pit operates completely within the limits of the law, living in the vicinity of, or along the haul route of, an aggregate pit means noise, vibration, dust, and heavy truck traffic. What we have learned from the

people who call us is that pit operators do not always keep within the terms of their licences -- hours of operation are commonly violated, for example. Inadequate or absent pit rehabilitation is a common issue. So are the destruction of natural habitat, the erosion and sedimentation of water courses, groundwater interference and depletion and the alteration of watershed boundaries. We have also learned that the Provincial agencies involved -- the MNR, the MoEE -- do not have the resources to adequately monitor licence compliance. Nor do they have adequate resources for enforcing licence violations.

Another common problem is inadequate public notification. While the Aggregate Resources Act provides for public comment, many of the people who call me feel the notice provisions are insufficient. There is not enough time for public comment. Some feel their comments are not given proper consideration.

The picture that emerges is unsurprising. Pits and people are an unhappy mix. People don't like pits. Pits are ugly. Pits and residential areas are incompatible. Pits destroy natural areas that local people love. Abandoned or improperly rehabilitated pits are eyesores. People are also increasingly concerned that pits can be and are located on hightly environmentall-sensitive, unique physical formation that are utterly destroyed because of aggregate extraction. Current legislation, policy and enforcement practices do not provide adequate or, sometimes, any solution to these problems.

I would like to provide a specific example of what the current state of the legislation has done for one group of people.

We recently represented a group of citizens in Chatsworth, Ontario who were opposing the opening of a Class B licence pit. Now, one might well wonder what kind of fuss could possibly be raised over the extraction of 20,000 tonnes of sand in a year -- which is why this case is such a good example of the kind of disruption aggregate extraction visits on people's lives. The Class B licence application was for a small pit directly adjacent to a Class A permit pit which has been operating for some time. There are about twenty homes in the area of the Class A pit with sixty or seventy people living in them. The large pit disrupts these peoples' lives. There were alleged licence violations that were not investigated. Big gravel trucks hurtle down the road, the drivers assuming that the speed limit signs are for the locals. People out on their property get caught in choking clouds of dust. No one can sit outside in the summer. In their secluded rural homes, these people live with noise surpassing urban levels for fourteen hours a day, five or six days a week.

The Class B permit application was the last straw. It became the focal point for the local people of all the frustration they had experienced because of the Class A pit. They organised; they fought the application tooth and nail. They called us, and we took their case. Our clients met with the proponent, and came to an agreement with him. The agreement included load restrictions and other conditions including a restrictive covenant

on the land. It also established a community liaison committee.

What is important about this example is that the solution found by our clients existed outside of the current legislative regime. They were forced to innovate, because the law had little to help them. Indeed, the solution was so innovative, the Board was unsure it could be fully implemented. And they still have to live with the Class A pit.

From this example, and the anecdotal evidence we hear over the phone, our understanding of the current situation is that many of the concerns of people living on property close to an existing, new or expanding pit are neither persuasive before the Ontario Municipal Board nor adequately accommodated by legislation or enforcement practices.

The conclusion we draw from this evidence is that current policies dictate that in the larger public interest of ensuring a cheap and plentiful supply of aggregate, the concerns of a handful of individuals cannot matter. These people, who -- nothing like a handful -- number in the thousands province-wide, must bear, in terms of the value of their property, the quality of their lives and the quality of the environment around them, a cost of aggregate extraction that the legislation does not adequately recognise.

It is CELA's understanding that this and other problems attendant to current practices arise from the fundamental premise of the current legislative regime -- or, perhaps more accurately, the fundamental premise in the application of the regime. That premise appears to be "aggregate extraction at almost any cost."

Even though MARPS is not supposed to "trump" other Provincial Policy Statements, in its application it in effect does, as well as trump many other considerations of the environmental and social cost of aggregate extraction. The Oro Township decision provides an excellent example of MARPS in action, which brings me to the second part of my discussion.

PART TWO: The Legislation in Action -- The Oro Township Decision

In its decision,[1] the Board describes the area to be affected by the four aggregate permits in some detail:

> Oro Township contains many beautiful natural features. One is the treed upland area known as the Oro or Bass Lake Kame Moraine (the Oro Sandhills) and the kame hills associated with it running from east to west across the northern part of the township and beyond. The moraine, about 25 kilometres in length and of widths varying from 1 to 7 kilometres, is the recharge area for rivers, creeks and swamps on all sides. There are a number of residences and farming operations on the moraine as well as abandoned or unused farmlands.

> There is also heavy tree cover, some of which is first growth. In other places, plantings cover earlier logging operations. There are hiking and cross country ski trails. Because uncultivated and treed areas exist, there are many species of animals, birds, and wild flowers. Some of the birds and plants found in the area were described at the hearing as rare or endangered.[2]

The Board also outlines what these beautiful natural features and important social values are up against: the Provincial policy imperatives of MARPS:

> The Mineral Aggregate Resources Policy Statement of the Provincial Government (MARPS) rests on a number of accepted facts and conclusions. There is a public need for aggregate and all parts of the province share responsibility for providing a supply on a local, regional and provincial basis to meet that public need. An aspect of meeting that need is ensuring that there is "close to market" access to an abundant supply, in competitive holdings, of the full range of needed aggregate products. Since aggregate is only found in certain locations, a negative environmental impact results overall if producers are forced to move beyond sources closest to them to other sources located at a greater distance away. In other words, a supply close to market lessens the degree of environmental impact, because moving aggregate longer distances requires consumption of greater amounts of fossil fuel, greater impact on the quality of air and greater social impact.[3]

I would like to review this statement in some detail, beginning with the fact identified by the Board, the fact that there is a public need for aggregate. Think about what this means. Other businesses normally have to undertake expensive market research to find out whether or not there is a demand for their product. But aggregate operators have a piece of provincial policy that says there is a need for their product. Under MARPS, the need for aggregate is virtually legislated.[4]

What this need means in terms of balancing policy statements can be illustrated by comparison with the Wetlands Policy. The Wetlands Policy identifies wetlands as "important", and states as its objective "To achieve no loss of Provincially Significant Wetlands." MARPS describes aggregates as "essential natural resources" and states that "mineral aggregates should be available to the consumers of Ontario at a reasonable cost." Both policy statements state that neither "supersede[s] or take[s] priority over other policy statements." That is, they are to be considered equally. We suggest, on the wording of the two policy statements, it is difficult for the OMB to keep its consideration equal.

The problem lies partially with the fact that while MARPS clearly expresses an *need* for aggregate as an *essential* resource, the Wetlands Policy states that wetlands are only important. The significance of this difference in word choice is made clearer when one also understands that the need for aggregate arises from a market that MARPS also

acknowledges. "Consumers", it says, should have aggregate at "reasonable cost." There is, however, no "market" for wetlands. The "market logic" of MARPS makes it difficult to argue that wetlands, even if the policy describes them as important, are more important than aggregate extraction, especially when the aggregate is close to market and of high quality (both of which elements are incorporated in MARPS). As there are no corresponding elements in the Wetlands Policy to meet these market considerations, there can be no balance.

In short, the two policy statements cannot be considered equally. The imperatives of exploitation in MARPS outweigh the imperatives of conservation in the Wetlands Policy.

Furthermore, the "market logic" of MARPS has made it difficult for people to oppose gravel pits whether they are good, bad or indifferently planned.[5] The impossibility of opposing MARPS is plain in the words, noted with approval by the Board, of an expert who testified at the Oro Township hearing:

> MARPS recognizes the inevitability of the extraction of these non-renewable resources. Putting off approvals to a later time encourages public confusion as to the future outcome of applications for extraction.[6]

It is our submission that MARPS does more than recognize the inevitability of extraction, it literally creates that inevitability. The result is that, while the Board acknowledges that the concerns of both the environment and the need for aggregate must be balanced, the irrefutable facts and conclusions of MARPS do not allow for an even balance. Rather, they automatically tip the balance in favour of aggregate extraction. The best citizens can hope for is restrictions on the licence and some kind of mitigation of effects -- all of which, as noted previously, are inadequately monitored and unevenly enforced.

It was decided in the Oro Township hearing that the zoning applications would be approved. And some colonies of wild ginseng will be left, one hopes, untouched. And mining will be undertaken in phases, with, one hopes, pit rehabilitation instantly following the exhaustion of each phase. But, a total of 335.3 hectares of land will be affected, and a potential annual total of 5,150,000 tonnes will be extracted over a period of, possibly, eighty years. Given the sensitivity of the area, there is no doubt that these pits will have significant environmental impacts, including the impact of the irrevocable loss of what is there now. There is no doubt that we have only an imperfect idea of what the full effect of that loss will be. The imperatives of MARPS do not permit adequate consideration of this loss.

It is our submission that the policies and legislation do not meaningfully address the most serious environmental impacts of aggregate extraction. In the passage quoted at the beginning of this section, the Board states that it is sound environmental policy to limit the distance between source and market for aggregate. This, says the Board, saves fossil fuel and limits the social impact of aggregate extraction. Once one considers the larger

context of this statment, it is clear that it does not describe anything like a sound environmental policy.

One of the largest sources of demand for aggregate is roads. So long as aggregate remains cheap and readily accessible, there will be that much less incentive to acknowledge the environmental costs of the car culture. Cheap aggregate means more roads, means more consumption of fossil fuel, more air pollution, and means as well all the other costs of the car culture such as urban sprawl, loss of prime agricultural land, interference with watersheds and aquatic life habitat, salt contamination of agricultural soils and groundwater, steady destruction of the remnants of the natural heritage system, persistent waste problems such as old tires and so on.

The "sound environmental policy" of MARPS is limited and short-sighted. The virtual guarantee of access to aggregate wherever it exists provides no incentive to conserve, recycle, or find alternative materials to aggregate.

It is our submission that current policies insufficiently acknowledge the real environmental and social costs of aggregate extraction. Therefore, it is unlikely that they can adequately deal with these concerns as they relate to the Mardon or any quarry.

Part Three: The Really Big Picture -- What We Need All This Aggregate For

The specific topic of discussion today is the law and the Mardon Quarry. Transportation policy might seem somewhat far removed from this topic. But, as already noted, there is an important connection between aggregate and roads, and I would like to take a few minutes to explore this connection.

Current policies assume aggregate extraction is inevitable and necessary; similarly, current transportation policy assumes that the construction of more and bigger roads is inevitable and necessary. It is clear that in order to reform the presumptions informing aggregate policy, transportation policy which creates a huge demand for aggregate must also be reformed.

Government policies display a strong bias toward roads instead of examining more environmentally benign means of transportation. For example, even as we meet today, another 400 series highway is being built. In the pell mell rush to get this road started, there has been little consideration given to whether or not there are better ways to move people and things across Toronto. There has been no thought given to using more efficiently the roads we have already. Little consideration has even been given to the effect the new planning regime will have on the need for roads. There was no consideration of these important factors because Highway 407 has been granted an exemption under the Environmental Assessment Act.

Until such time as there is reform of MARPS and the policies, practices and procedures

of the Aggregate Resources Act, and without environmental assessment of mega-projects such as Highway 407 and mega-pits such as Mardon, sufficient attention will not be given to these big picture issues. It is the failings of the law and policy that cause small picture problems -- such as those outlined at the beginning of this paper. The failings of the current regime also cause irrevocable harm to irreplaceable landforms that have incalculable value over and above their loadings of high quality aggregate. Until such time as sufficient attention is paid to these issues, there will always be too much pressure on aggregate resources, and too many unacceptable environmental and social costs.

RECOMMENDATIONS TO THE ENVIRONMENTAL ASSESSMENT ADVISORY COMMITTEE

1. Given the deficiencies of the current legislative regime, CELA recommends that EAAC advise the Minister that an Environmental Assessment is necessary in order to gauge the environmental impacts of the Mardon Quarry.

2. In light of the recent announcement of new planning law in Ontario, CELA also requests that EAAC's report to the Minister be made public as soon as possible.

3. EAAC should advise the Minister to order a public review of Aggregate Resources Act policies, provisions and practices to examine, among other things

    a) public notice requirements
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    d) the virtual legislation of need implicit in MARPS
    e) incentives to recycle and find alternatives to aggregate

NOTES

1. Re Oro (Township) Lots 7 and 8, Concession 7 Official Plan Amendment, Ontario Municipal Board Decisions: [1993] O.M.B.D. No. 1231, File Nos. Z 900257, Z 910141, Z 910142, Z 910173, O 910158, M 900101, M 890125, M 920003, M 920004.

2. The text of the decision from which this quotation comes was down-loaded from QuickLaw, so I cannot supply page references. However, this statement is located in the Board's section identified as "1. BACKGROUND" on page 1 of my copy.

3. This statement is located in the second full paragraph after the Oro Township decision heading "5. Demand and Supply" on page 10 of my copy.

4. In Re Puslinch Official Plan etc., unreported decision of J.A. Wheler and R.W. Rodman, June 27, 1990, O.M.B. file nos. DB83-F-59, O880075, Z860131, M880019, Z870049, M880029, O880184, M880094, Z880185, the Board reviews the capacity of the municipal council to regulate aggregate extraction according to questions of need and, in doing so, provides a good overview of the meaning of need established in MARPS(at pp. 28-29):

> Although the fact that the supply of mineral aggregate is a matter of provincial interest and concern, even MARP acknowledges the possibility of some social cost as it also acknowledges the possibility of some environmental cost. But, rather than discouraging extraction where these possibilities might exist, MARP still recognizes the principle of extraction in these circumstances, the need for the material at reasonable cost being so great, so long as "extraction is carried out with minimal social and environmental cost."
>
> MARP makes it abundantly clear that the need for the resource takes precedence over almost all other considerations....It is clear to the Board that MARP is the governing or chief factor in the development of the aggregate policies for an official plan and once an official plan comes into effect, it then governs. Great care must therefore be taken to develop an official plan that does not overtly offend the thrust of MARP. At the same time it would be most inappropriate to use MARP in substitution for good land use planning. The thrust of MARP, however, has convinced the Board that any concept of "need", as an official plan policy that must be satisfied before extraction would be permitted, is prohibited by section 3 (6) of the Planning Act. MARP, as government policy, in a context of an Official Plan precludes Council from exercising any discretion on the basis of need.

Puslinch is generally acknowledged as an important decision because it does allow for consideration of interests other than extraction. It is important to note that the single strongest "other interest" in that decision was residential development already in the area. The factor which permitted the balancing of interests was the township council's concern for the "tolerance levels" of the population to be affected by extraction activities. Before the Board were no issues regarding the preservation of natural habitat or provincially significant landforms, as there were in the Oro Township decision. Puslinch establishes that human populations may be protected, for a while, at least, from the effects of extraction, but leaves open the question of how irreplaceable landforms might be preserved from the imperatives of MARPS.

5. In Re Melancthon (Township) Official Plan Amendment, 25 O.M.B.R. 104 at 106-107, the Board considered the objections of citizens to a Class A permit in the following manner:

> Ms Laing's letter of appeal is extremely detailed [however, the Board does not indicate what any of those details are]. It is three pages long, single-spaced, and it is obvious from reading it that she objects to the redesignation of the lands as well as the rezoning. ...As Ms. Laing put it: 'All we want is to have our concerns aired before an impartial third party.'
>
> I will say at the outset that Ms Laing was unable to convince me that I should not approve the amendment. This was despite very sincere and laudable motives on the part of her and her fellow appellants...
>
> Ms Laing's husband argued that gravel should be conserved for future generations but the aggregate resources policy suggests an opposite conclusion. It says supplies of this valuable resource should be protected from housing development. If anything, the province wishes to ensure adequate supplies, and protect both public and private consumers from the higher costs that result from scarcity.
>
> All the residents were concerned with dust, traffic and noise. These impacts will undoubtedly continue to occur and perhaps increase...The issue of trucks running stoplights and speeding was also raised but this is a matter of enforcement. Unfortunately, these urban type problems are now also to be found in rural areas.

Stated succinctly, the Board's position is, as noted in the text of our submission, "in the greater public interest of ensuring a cheap and plentiful supply of aggregate, the interests of a handful of individuals cannot matter."

6. This statement can be found several pages into the section the Board identifies as "10.4 Allan G. Cook Limited" in the Oro Township decision. It is on page 63 of my copy.

objectives, guidelines and codes of practice published under Part 1 of CEPA. Nor, is there any realistic opportunity to comment on the terms of ocean dumping permits.[20]

20.1 Recommendations

- The right to notice of all statutory instruments or policies under CEPA, as well as the right to comment on them, should be enshrined in the Act. The existing policy of notice for regulatory initiatives in the Canada Gazette Part I should also be enshrined in the Act.

21.0 Declaration of Public Trust

Although the federal government shares responsibility for the protection of the environment with the provinces, it has the clear authority to declare in favour of the citizens of Canada a trust over all natural resources under its jurisdiction. The public trust doctrine is a procedural and substantive safeguard against the abuse of government decisions in the management of publicly owned natural resources, such as federal lands and fisheries, or in the regulation of the uses of private property which are likely to impair rights of the public to such publicly owned natural resources.

From its source in the Magna Carta to decisions of the United States Supreme Court[21], the doctrine of public trust has stood as a restraint on the exercise of government powers, which have resulted in impermissible, although often subtle, reallocations of distinct and valuable public rights for private uses which do not primarily promote public purposes. Properly viewed, the doctrine is as fundamental to the good order of our government as are restraints on taxation, co-mingling of public and private property and the exercise of police power. Indeed, in the absence of the public trust doctrine, there are no equivalent restraints on potential abuse of power by the government in the reallocation or impairment of air, water and other natural resources.

The existence of a public environmental trust has been debated in Canada, although it is clear that, to the extent that such a trust

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[20]The terms or conditions of a permit must be published in the Canada Gazette Part I; however, since notification in the Canada Gazette Part I can proceed by less than a day the date of actual dumping, there is no chance for comment. Moreover, as discussed in the ocean dumping chapter only the applicant for the ocean dumping permit is given the right to file a notice of objection to a permit.

[21]Illinois Central v. Illinois, 146 U.S. 452 (1892).

enforcing the trust, the courts have broad authority to impose current and future obligations on governments and persons. The terms of the trust should include references to basic principles such as the precautionary principle and the principles of sustainability.